

**UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK**

In re Scotts EZ Seed Litigation

Civil Action No. 12-CV-4727 (VB)

**MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFFS' MOTION TO PRECLUDE  
SCOTTS FROM OFFERING ANY EXPERT TESTIMONY ON CONSUMERS'  
UNDERSTANDING OF THE 50% THICKER CLAIM**

Dated: June 30, 2016

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## I. INTRODUCTION

To determine whether EZ Seed’s “50% Thicker With Half The Water” claim is false or misleading, the Court will have to consider how consumers understand and interpret that claim. The pertinent question is “what does the person to whom the advertisement is addressed find to be the message?” *Procter & Gamble Co. v. Ultreo, Inc.*, 574 F. Supp. 2d 339, 345 (S.D.N.Y. 2008).

To address that precise question, Plaintiffs engaged a survey expert, Dr. J. Michael Dennis, to conduct a consumer perception survey to measure purchasers’ understanding and expectations about the “50% Thicker With Half The Water\*\*\*” claim and its “\*\*\*” footnote. SOF ¶ 52. Dr. Dennis also considered and analyzed a survey by Smith-Dahmer Associates, LLC, which had been engaged by Scotts in 2011 to conduct a consumer satisfaction survey of EZ Seed users. Marchese Decl. Ex. II, Dennis Report ¶ 59 (citing SD-EZ 001692). Smith-Dahmer surveyed 300 EZ Seed users [REDACTED]

[REDACTED] SOF ¶ 45. The survey asked [REDACTED]  
[REDACTED] *Id.* ¶ 46. Dr. Dennis’s expert opinions on consumers’ understanding of the 50% Thicker Claim, based on his own survey and the Smith-Dahmer survey, are set forth in his expert report, Marchese Decl. Ex. II, and are discussed in Part IV of Plaintiffs’ summary judgment brief, submitted herewith.

Scotts has submitted two expert reports, from Jacob Jacoby, Ph.D. and David Reibstein, Ph.D., which present some criticisms of Dr. Dennis’s work as it relates to the calculation of the price premium associated with the “50% Thicker” claim. But these experts ignored the portions of Dr. Dennis’s report addressing consumers’ understanding of the claim. They also ignored the Smith-Dahmer survey.

**II. DR. JACOBY CANNOT OPINE ON CONSUMERS' UNDERSTANDING OF THE 50% THICKER CLAIM**

Dr. Jacoby's expert report criticizes some of the survey work underlying the price premium calculations of Plaintiffs' experts. But Dr. Jacoby did not conduct any survey of his own. Nor did he do anything to attempt to determine [REDACTED]

[REDACTED]

[REDACTED]  
[REDACTED]

[REDACTED]

Marchese Decl. Ex. G, Jacoby Dep. at 42:21-24.

In fact, Dr. Jacoby conceded that he has no opinions about how consumers understand the 50% Thicker claim:

[REDACTED]  
[REDACTED]  
[REDACTED]

*Id.* at 137:9-12.

**III. DR. REIBSTEIN CANNOT OPINE ON CONSUMERS' UNDERSTANDING OF THE 50% THICKER CLAIM**

Dr. Reibstein's report criticizes some of the survey work underlying the price premium calculations of Plaintiffs' experts. But Dr. Reibstein did not conduct any survey of his own. SOF ¶ 69. Dr. Reibstein did not consider or review the Smith-Dahmer survey that Scotts had commissioned. *Id.* ¶ 70. Nor did he do anything to attempt to determine how consumers understand the 50% Thicker Claim. *Id.* ¶¶ 69-72 .

## CONCLUSION

For these reasons, Dr. Jacoby and Dr. Reibstein should be precluded from offering any opinion on how consumers understand the “50% Thicker With Half The Water” claim, and Scotts should be precluded from offering any expert testimony addressing this point.

Dated: June 30, 2016

Respectfully submitted,

By: /s/ Scott A. Bursor  
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